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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 266.

EDITH O. MASKE, *Petitioner,*

v.

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 181-182) is not yet reported.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether there was sufficient evidence of negligence to go to the jury in a non *res ipsa loquitur* personal injury action where plaintiff's version was uncorroborated and her credibility impeached in many material particulars.

Statement.

Petitioner filed an amended complaint whereby she sought damages for personal injuries upon the claim that a fellow bus passenger was forced against the seated petitioner by excessive speed and sudden stopping of respondent's bus (R. 2-3).[1] At pre-trial no mention was made of speed nor of a *res ipsa loquitur* claim, reliance being placed upon the specific negligence claim of a sudden stop (R. 5-6). The jury verdict for petitioner (R. 6) was reversed by the Court of Appeals upon the ground that as the verdict lacked substantial support respondent's motion for a directed verdict should have been granted (R. 182).

The accident occurred July 9, 1947 (R. 15). Sole evidence offered on behalf of petitioner as to the alleged negligence was her own testimony (R. 11). She testified that: the bus was going 30 to 35 miles per hour (R. 17, 19), crossed 5th Street and came to a violent stop (R. 17) with its front end in the cross-walk (R. 18); a standing passenger was thrown forward by the stop and stepped on top of petitioner's foot (R. 17, 31); the stop was for no apparent reason (R. 18), and although petitioner was looking ahead of the bus in the direction it was traveling before, and at the time of, the sudden stop there was no car in front of the bus (R. 34); petitioner was treated the date of the accident by Dr. E. W. Schwartze, deceased (R. 20, 21, 39), and had signed a blank piece of paper for him (R. 35), but she had never told him nor anyone that the cause of

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[1] Petitioner's amended complaint charged the fellow-passenger with negligence in failing to secure a proper grip upon the bars provided for the safety of standing and seated passengers. Before trial petitioner dismissed her action as to the fellow-passenger (R. 5).

the sudden stop was a near collision with a car (R. 35, 43).

All witnesses except petitioner, including the bus driver and three disinterested passengers, testified to the effect that the speed was reasonable (R. 124, 49, 56, 62). All saw a taxicab in front of the bus (R. 124, 62, 56, 48). The place of the stop was uniformly placed at a point other than the intersection of 5th and E Streets (R. 125, 127, 61, 55, 48). The evidence was that the emergency arose "very suddenly" and prompt safety measures were taken (R. 51, 124).

Petitioner's uncorroborated testimony was further demonstrated to have been false relative to her claims: of first having been treated for her alleged injuries on the date of the accident rather than nine days later (R. 20, 21, 39; R. 109); of never having had arthritis in the right foot prior to the accident (R. 43, 44; R. 152); of never having seen the investigator who had secured her signed statement (R. 35, 43; R. 68); of not only not having written the word "supervisor" on the Medical Report signed by Dr. E. W. Schwartze but of never having seen the paper, Exhibit "E" (R. 41-42; R. 91, 98, 179). Despite her denials, it was "proved beyond reasonable doubt" that petitioner had told her doctor the "bus and an auto almost had a collision" (R. 179, 182).

Argument.

The issue in the instant case is the familiar one of whether a verdict lacked substantial support in the evidence, and no amount of disappointment upon petitioner's part can convert the case into one warranting review by this Court on certiorari.

In the first place, the decision of the Court of Appeals was clearly right because petitioner's uncorroborated trial version of the accident, considered with all the disinterested testimony and her own prior contrary statement to her doctor, amounted at most to a "mere scintilla" of evi-

dence, which did not entitle her to go to the jury.[2] In the second place, petitioner's contention that because this was a common carrier case it was a *res ipsa loquitur* case and therefore had to go to the jury is erroneous.[3] A passenger may proceed upon a *res ipsa loquitur* theory, but need not do so, and indeed should not do so where the facts are admittedly available.[4] Petitioner neither pleaded, relied on at pretrial, nor sought to amend at the trial to claim reliance on *res ipsa loquitur*. Finally, even if the Court of Appeals for the District of Columbia Circuit decision were considered erroneous or unwise, that court has long been accorded, as a matter of policy by this Court, the right and duty to declare the local law of the District of Columbia as if it were the highest court of a state.[5]

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[2] *Pennsylvania R. R.* v. *Chamberlain*, 288 U. S. 333 (1933); *Jackson* v. *Capital Transit Co.*, 69 App. D. C. 147, 99 F. 2d 380 (1938).

[3] Mere relationship of carrier and passenger neither automatically brings into play the doctrine, nor forecloses a favorable result to the defendant at the direction of the court. *Brown* v. *Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329 (1942) (directed verdict where passenger fell); *Connor* v. *Washington Ry. & Elec. Co.*, 43 App. D. C. 329 (1915) (demurrer sustained to allegation of "sudden start"). *Capital Transit Co.* v. *Jackson*, 80 U. S. App. D. C. 162, 149 F. 2d 839 (1945), relied upon by petitioner (Petition, p. 12), is not a holding to the contrary since there the defendant-carrier put on no proof.

[4] *Res ipsa loquitur* is a "rule of necessity to be invoked only when necessary evidence is absent and not readily available." See 3 COOLEY, TORTS (4th ed. 1935) § 480. A recent statistical study indicates that in airline accidents, plaintiffs relying upon *res ipsa loquitur* prevailed in only one of eleven cases. McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation* (1951) 37 VA. L. REV. 55, 60.

[5] *Griffin* v. *United States*, 336 U. S. 704, 717 (1949); and see list of cases in which certiorari has been denied, appendix to opinion, p. 719. The fact that for the District of Columbia, its Court of Appeals adopted a rule of law unique throughout the United States did not move this Court to grant certiorari in *Argonne Co., Inc.* v. *Hitaffer*, 340 U. S. 852 (1950).

Conclusion.

The decision below is correct in requiring substantial support in the evidence for a verdict, and represents a matter of purely local law for the District of Columbia. It is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Counsel for Respondent.

HOGAN & HARTSON,
Of Counsel.
August, 1951.

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In The

Supreme Court of the United States

October Term, 1951

No. 266

Edith O. Maske,

Petitioner,

v.

Washington, Marlboro & Annapolis Motor Lines, Inc.
(Also known as W. M. & A. Motor Lines Inc.)
a body corporate

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Edith O. Maske, by her attorney, Dorsey K. Offutt, respectfully petitions this Court for a rehearing of the order made on October 8, 1951 denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its judgment in this case.

STATEMENT

On August 21, 1951 there was filed in this Court a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision in this cause.

The following five questions were presented by the petitioner:

1. Whether applicability of the *res ipsa loquitur* doctrine in a common carrier case permits the entry of a directed verdict against a passenger.

2. Whether the inference of negligence permitted by the *res ipsa* doctrine can be vitiated by the carrier's explanation for the accident without regard to whether that explanation is believed or accepted by the jury or trial court.

3. Whether a directed verdict can be ordered by an appellate court where plaintiff admittedly established a prima facie case and where there is conflicting evidence.

4. Whether a common carrier passenger properly relying on the *res ipsa* doctrine is foreclosed from recovery or a jury's evaluation of the carrier's proffered explanation of the accident, because the passenger does not have affirmative independent evidence to rebut the alleged explanation.

5. Whether petitioner has been denied her right of trial by jury because her credibility was doubted by the Circuit Court of Appeals, although not by the jury or the trial court.

On October 8, 1951, this Court made an order denying the petition. Mr. Justice Black declared he was in favor of granting the petition.

On October 19, 1951, the Honorable, the Chief Justice, extended the time for filing a petition for rehearing to and including November 10, 1951.

This petition for rehearing is made pursuant to Rule 33 of the Rules of this Court, as amended.

The grounds on which this petition is made is that there are substantial grounds available to petitioner for the granting of the petition which were not previously presented.

REASONS FOR GRANTING THE PETITION FOR REHEARING AND PETITION FOR A WRIT OF CERTIORARI

1. Petitioner has been denied a jury trial in contravention of the Seventh Amendment to the Constitution of the United States.

2. Petitioner has been denied her right to a jury trial under the Seventh Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals was without Constitutional right under the circumstances of this case to reverse the judgment of the trial court without granting a new trial.

4. Rule 50(b) of the Federal Rules of Civil Procedure contravenes the Seventh Amendment to the Constitution of the United States insofar as it permits an appellate court to weigh substantial evidence and resolve conflicting evidence and inferences therefrom, as was done by the Circuit Court of Appeals.

1, 2. The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Circuit Court of Appeals after the case was submitted to a jury and a verdict was returned by it in favor of petitioner and although judgment n.o.v. and motion for new trial were each overruled by the trial court who heard the evidence and observed the witnesses, re-examined and re-evaluated the testimony, weighed conflicting evidence as well as the permissible inferences which might have been drawn therefrom, and overturned the verdict of the jury ordering a final judgment for the respondent. The Appellate Court in so doing not only deprived petitioner of a jury trial but also of her right to a jury trial, for the jury's verdict was set aside and petitioner may never have her case heard by a jury. In both respects the action of the Circuit Court of Appeals below was in violation of the petitioner's right under the Seventh Amendment.

The decision and judgment of the Circuit Court of Appeals in the instant case is of far-reaching importance and effect, and represents a landslide in the process of judicial erosion of the essential guarantee under the Seventh Amendment. The impact of this decision will be incalculable on courts—both trial and reviewing—in encouraging and sanctioning the weighing and re-evaluating of conflicting evidence, gradually absorbing the jury's function, substituting their opinion on the evidence for that of the jury, and progressively depriving litigants of jury trials.

In recent years numerous decisions of this Court have been rendered respecting the guarantees of the First, Fourth, Fifth and Sixth Amendments, safeguarding those

provisions of the Bill of Rights which were found to have been abridged or denied. There have also been many cases under the Federal Employers' Liability Act (a quasi-specialized action analagous in some respects to the kind of case here presented) in which the Constitutional function of the jury was obliquely involved in the course of the interpretation of the Act.

This Court has not hesitated to restrain executive and legislative action, State or Federal, which has contravened the historic safeguards found in the Bill of Rights and as construed to be embodied in the Fourteenth Amendment. But when the vast number of civil jury trials affecting the rights to secure the lives and property of our citizens and inhabitants is envisaged, it is at once realized there is no Amendment more important to the litigant, citizen or alien, and to the welfare of the people or more precious for them, safeguarding them from arbitrary action, than the right of jury trial guaranteed by the Seventh.

Rather diffidently it is suggested that the Constitutional right preserved by the Seventh Amendment is one which calls for restraint upon the courts by themselves. More especially, therefore, should this Court be zealous in restraining an Appellate Court from in any way depriving or interfering with a jury trial or a right to it, under that Amendment. It is unthinkable that any less regard be had for an invasion of Constitutional right by judicial tribunal than by unconstitutional action of any other authority or that such invasion be harmless if done by the courts themselves. The courts, as guardians of those rights, should themselves set the example of strict observance of Constitutional guarantees to the citizen and Constitutional limitations upon judicial authority, in order that it may not be said in any quarter that the courts have any less heed for judicial encroachment upon Constitutional guarantees than from any other source.

As this Court said in *Jacobs* v. *New York*, 315 US 752, 86 L ed 1166, 62 S.Ct. 854:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

In *Ellis* v. *Union Pacific Railroad Co.*, 329 U.S. 649, 91 L. ed. 572, 67 S. Ct. 598 this Court reversed the judgment of an appellate court setting aside alleged asserted insufficiency of evidence to support the verdict of a jury stating:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P.U.R. Co. 321 US 29, 88 L Ed 520, 64 S. Ct. 409, 15 NCCA (NS) 647; Lavender v. Kurn, 327 US 645, 90 L ed 916, 66 S Ct 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 US p 652, 90 L ed 922, 66 S Ct 740). And where, as here, the case turns on controverted facts and the credibility of witnesses the case is peculiarly one for the jury. Washington & G.R. Co. v. McDade, 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044; Tiller v. Atlantic Coast Line R. Co. 318 US 54, 68, 87 L. ed 610, 618, 63 S Ct 444, 143 ALR 967."

And in *Wilkerson* v. *McCarthy*, 336 US 53, 93 L ed 497, 69 S. Ct. 413, it was said:

"The opinion of the Utah Supreme Court strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony. This court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. See, e.g. Lavender v. Kurn, 327 US 645, 652, 653, 90 L ed 916, 922, 66 S Ct 740; Bailey v. Central Vermont R. Co. 319 US 350, 354, 87 L ed 1444, 1447, 63 S. Ct. 1062; Tiller v. Atlantic Coastline R. Co., 318 US 54, 68, 87 L ed 610, 618, 63 S Ct 444, 143 ALR 967; see Brady v. Southern R. Co. 320 US 476, 88 L Ed 239, 242, 64 S Ct 232. It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case."

Moreover, in *Tennant* v. *Peoria & Pekin Union Railroad Co.*, 321 US 29, 88 L ed 520, 64 S. Ct. 409 it was said:

"Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. Galloway v. United States, 319 US 372, 395, 87 L ed 1458, 1473, 63 S Ct 1077; Atchison, T. & S.F.R.Co. v. Toops, 281 US 351, 74 L ed 896, 50 S Ct 281. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors."

In *Lavender* v. *Kurn*, 327 US 645, 90 L ed 916, 66 S. Ct. 740, it was said:

"But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to litigate the factual dispute in a reviewing court. Under

these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

In a petition of this nature, it seems neither feasible nor appropriate to make a detailed analysis of the evidence, but beyond a shadow of a doubt there was a sufficient case made for the jury.[1] It is believed no one

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[1] Without unnecessarily duplicating matters already in the record, suffice it to say, R. 184, 193, and Petition for Writ of Certiorari (Pages 10 to 17) conclusively demonstrate this. Moreover, in *Chicago & Northwestern Ry. Co.* v. *Green*, 8 Cir., 164 F. 2d 55-60, in holding the scope of jury inference in the quasi-analogous cases under FELA must be liberally and not narrowly or stultifyingly viewed, it was said:

> "And traditionally, even more plenary than in cases requiring proof of specific negligence is the scope of inference which has been recognized as being open to a jury in situations of res ipsa loquitur.
>
> "Thus, it was said in the somewhat early case of Gleeson v. Virginia Midland Railroad Co., 140 US 435, 444, 11 S.Ct. 859, 862, 35 L. ed. 458: 'When [the plaintiff] proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. * * * And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.'
>
> "[3] Only where the defendant's evidence of explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case. Cf. Myers v. Pittsburgh Coal Co., 233 US 184, 193, 34 S.Ct. 559, 58 L.Ed. 906."

Such situations will be "of the rarest exceptions." The jury in the instant case on the whole record evidently thought, as they had a right to believe, the defendant's explanation of the sudden, violent jerk which admittedly occurred and threw passengers forward, was insufficient to show that the alleged emergency which it was contended required the bus driver to stop suddenly was not one created

can read the record in this case and the opinion of the Circuit Court of Appeals without coming to the inescapable conclusion that the Appellate Court took upon itself the function of an appellate jury, resolving matters of credibility of witnesses, re-evaluating the evidence and drawing its own inferences, narrower than the scope of permissible inferences open to the jury. A casual reading of the short opinion dealing only with factual matters will reveal that the Appellate Court plainly substituted its view of the evidence for that of the jury, which is precisely the purpose of the Seventh Amendment to avoid and prevent.[2]

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by his own negligence in whole or in part. See *Wichita Transportation Corporation* v. *Braly*, 10 Cir., 150 F. 2d 315:

> "The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it. . . . Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that if the driver of the bus had kept a reasonable lookout he should have anticipated the act of the driver of the automobile and, therefore avoided the necessity of the sudden stop which caused the injuries to appellee."

See also *Bell Cab Company, Inc.* v. *Coppridge*, 81 US App. D.C. 337, 158 F. 2d 540.

The jury were likewise warranted in this record in finding the respondent's bus driver's acts of omission or commission constituted a "contributing proximate cause" of the sudden stop. *Carter* v. *Atlantic & St. Andrews Bay Railway Co.*, 338 US 430, 435, 70 S.Ct. 226, 94 L.Ed. 236; *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 191 F. 2d 302.

[2] The opinion baldly states (R. 181): "The chief question of fact at the trial was whether the sudden stop was (1) unnecessary and negligent or (2) necessary to avoid collision with a taxicab that turned suddenly across the path of the bus." The court then proceeds to make a jury determination of such question of fact, supporting much of its conclusion upon a slight portion of the record

It must be remembered the respondent, defendant in the trial court, recognized at the time that a *prima facie* case had been made by petitioner and did not even go through the formality of moving for a directed verdict.

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of cross-examination of petitioner, actually without probative force. The questions on cross-examination quoted in the court's opinion are without evidentiary value because the factual matters were contained in the questions of the cross-examiner. In short, the cross-examiner was trying to place before the jury a version through the medium of a question to which the answer gave no force whatever. For example, the first question could have been patented so as to read: "Mrs. Maske, did you see this car suddenly and without warning pull out immediately in front of the bus an instant before the bus driver put on his brakes to stop the bus instantly in order to keep from having a collision?" A. "No, sir." Now, to this type of question and answer, the Appellate Court attached decisive probative force. Really, the first question quoted in the opinion below indicated that the bus had already stopped before the car pulled out.

The other questions calling for what petitioner who sat on a side seat behind the driver, not facing in the direction of the bus driver, in a crowded bus, did not see are without probative effect.

The suggestion that "It was proved beyond reasonable doubt, although appellee denied, that she had told her doctor the 'bus and an auto almost had a collision,'" seems untenable (R. 189) but even this was a jury question as to whether she was impeached or contradicted on this and *a fortiori* as to the rest of the case.

As to the statement in the opinion (R. 182) "Though it may be more likely that one interested witness will overlook and forget something than that several disinterested witnesses will all imagine something, the jury in a particular case may not be unreasonable in believing the one and disbelieving the others," suffice it to say the relative weight of testimony is for the jury, and the so-called disinterested witnesses were themselves uncertain or contradictory and one was "daydreaming" until after the sudden stop (R. 61).

Finally, the crux of the court's decision appears in the sentence "but in view of appellee's relative uncertainty on the witness stand, and particularly in view of her previous contradictory statement to her doctor, we must conclude the verdict lacks substantial support." If this conclusion is not precisely what the jury itself Constitutionally is to arrive at, it is difficult to perceive what else its function would be. There was no uncertainty as to what petitioner testified to or any uncertainty in her testimony, where the question called for her personal knowledge.

at the close of petitioner's case in chief (R. 47, 185). Plainly, therefore, respondent conceded a case was made for the jury by petitioner and this, of course, included cross-examination of her, upon which so much stress as to a small part thereof, was made by the Circuit Court of Appeals in its opinion (R. 181, 182). Motion by the defendant-respondent in the trial court for directed verdict at the close of all the evidence was promptly denied (R. 166) and no reservation of the motion was then made by the court for later consideration.

The jury returned a verdict for petitioner in the amount of $20,000. The trial court denied respondent's motion for judgment n.o.v. and also motion for a new trial. The order of denial of those motions (R. 9) significantly stated:

> "• • • and it appearing to the satisfaction of the Court from all the evidence and testimony adduced at the trial in open court, and from the oral argument on this motion, that the verdict and judgment should stand • • •."

At no time, therefore, did the trial court who saw the witnesses, observed their demeanor, and heard their testimony, have any doubt that the plaintiff had made a case. Twelve jurors, likewise, viewed the evidence in petitioner's favor. How, then, could the Circuit Court of Appeals conclude that the verdict lacked substantial support or that plaintiff had been contradicted beyond a reasonable doubt, without unconstitutionally itself acting as a reviewing jury.[3]

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[3] *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 US 54, 87 L ed 610, 63 S. Ct. 444, 143 ALR 967:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co. 128 US 443, 445, 32 L ed 478, 479. Or as we have put it on an-

Since twelve jurors and the trial court drew conclusions favorable to the plaintiff, how could the Appellate Court in effect hold that fair-minded men would not reach different conclusions, which would make the jury's verdict stand.[4]

Rule 52 of the Federal Rules of Civil Procedure in dealing with actions tried upon the facts without a jury provides that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A jury verdict approved by the trial court is at least entitled to the same respect. They saw and heard the witnesses and had the "feel of the case which no appellate printed transcript can impart." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 US 212, 91 L. ed 849, 67 S. Ct. 752.

The Circuit Court of Appeals by its decision and judgment has plainly deprived petitioner of her Constitu-

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other occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

Cf. *Bailey* v. *Central Vermont Railroad Co.*, 319 US 350, 87 L ed 444, 63 S. Ct. 444, 143 ALR 967:

"The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * to withdraw such a question from the jury is to usurp its function. The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. Jacob v. New York, 315 US 752, 86 L ed 1166, 62 S.Ct. 854."

See also *Myers* v. *Redding Co.*, 331 U.S. 477, 91 L ed 1615, 67 S.Ct. 1334.

[4] *Gunning* v. *Cooley*, 281 US 94, 74 L ed 724, 50 S.Ct. 231; *Jones* v. *Tennessee*, V. & G. R. Co., 128 US 443, 445, 32 L ed 478; *Tiller* v. *Atlantic* Coast Line R.R. Co., 318 US 55, 87 L Ed 618, 63 S.Ct. 444; *Bailey* v. *Central Vermont R.R. Co.*, 319 US 350, 87 L ed 1444, 63 S.Ct. 1062.

tional right to a jury trial and has substituted itself for the jury in re-examining and re-evaluating the evidence, weighing the credibility of witnesses, all on a printed record, in contravention of the Seventh Amendment; and it is respectfully submitted this petition should be granted for this reason alone as well as for the deprivation of petitioner's right to a jury trial accomplished through summary and definitive direction to the trial court to enter judgment for respondent, which forever bars her right to have her case decided by a jury.

3, 4. The Circuit Court of Appeals was without Constitutional right under the circumstances of this case to reverse the judgment of the trial court without granting a new trial, and if done under the authority of Rule 50(b) of the FRCP, such action contravenes the Seventh Amendment if that rule is intended to permit an appellate court to resolve conflicting evidence, select some of the permissible inferences therefrom, and to pass upon the credibility of witnesses not seen or heard by the appellate court. *Slocum* v. *New York Life Insurance Co.*, 228 US 364, 57 L. ed. 879, 33 S Ct 523; *Baltimore & C Line* v. *Redman*, 295 US 654, 79 L ed 1636, 55 S Ct 890; *Aetna Insurance Co.* v. *Kennedy*, 301 US 389, 81 L ed 1177, 57 S Ct. 809.[5]

Re-evaluation by an appellate court of factual matters cannot Constitutionally be substituted for a retrial by a new jury. Such retrial by a new jury is a Constitutional right of the highest value. *Slocum* v. *New York Life In-*

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[5] See *Galloway* v. *United States*, 319 U.S. 372, 392, 87 L ed 1458, 1473, 63 S.Ct. 1077, in which in a footnote it is said:

"We have not given special consideration to the latest decisions touching the Amendment's [Seventh] effects in the different situations where a verdict has been taken, on the one hand, without reservation of the question of the sufficiency of the evidence [citing Slocum], and, on the other, with such a reservation [citing B & C and Aetna Ins. cases]."

surance Co., supra. The most the Circuit Court of Appeals could possibly have done in this case was to have awarded a new trial. It is true in *Montgomery Ward & Co.* v. *Duncan*, 311 US 243, 85 L ed 147, 61 S. Ct. 189, the Court said that an appellate court might itself render judgment n. o. v. or reverse and remand for a new trial but the Constitutional question raised here appears not to have been involved in that case.[6]

The matter might be viewed in another fashion. Could the Circuit Court of Appeals, if the case were before it in that way, render a summary judgment under Rule 56 in favor of the respondent on this record?[7] Most assuredly it could not do so. *Sartor* v. *Arkansas Natural Gas Co.*,

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[6] Attention of the Court is respectfully invited to the annotation to the *Montgomery Ward & Co.* case, 85 L ed 155, 161, under the heading "Constitutionality of Rule 50(b)" in which it is said in part:

> "In view of the fact that Slocum v. New York L. Ins. Co. (1913) 228 US 364, 57 L ed 879, 33 S Ct 523, Ann Cas 1914D 1029, discussed supra, not only has not been overruled upon its facts, although not controlling so far as its dicta are concerned, but has been reaffirmed (Aetna Ins. Co. v. Kennedy (1937) 301 US 389, 81 L ed 1177, 57 S Ct 809, discussed supra), and in view of the fact that it was intimated in Baltimore & C. Line v. Redman (1935) 295 US 654. 79 L ed 1636, 55 S Ct 890, discussed supra, that consent of the parties is necessary to the reservation by the trial court of its decision on a motion for a directed verdict, the question arises as to whether the provision in Rule 50(b) that whenever a motion for directed verdict has been denied, 'the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion,' is in violation of the Seventh Amendment to the Federal Constitution."

The rest of the annotation, too long to reprint here, is illuminating. See also dissenting opinion in *Galloway* v. *United States*, 319 US 372, 87 L ed 1458, 63 S. Ct. 1077.

[7] So far as the Appellate Court was concerned it decided the case upon a printed transcript of record, which might just as well have been by documentary evidence under the summary judgment procedure.

321 US 620, 88 L ed 967, 64 S Ct 724, in which it was said:

> "Rule 56 authorizes summary judgment only when the moving party is entitled to a judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

Is not that reasoning analagous to the situation here presented because in effect the Circuit Court of Appeals has rendered a summary, definitive judgment in favor of the respondent? Would not this Court, if such summary judgment had been rendered, review and remand for a new trial—a jury trial?

Rule 50(b) of the Federal Rules of Civil Procedure cannot, of course, supersede the Seventh Amendment. It does not absolutely require the trial court to enter judgment notwithstanding the verdict even though it is persuaded it erred in failing to direct a verdict for the losing party. *Cone* v. *West Virginia Pulp & Paper Co., supra.* The rule, if applicable to an appellate court, is no more compelling upon it. It is to be emphasized the trial court did not reserve ruling upon respondent's motion for a directed verdict at the close of all the evidence but promptly denied it.

The Seventh Amendment restrains judicial domination of a jury by appellate as well as trial courts. The Circuit Court of Appeals Constitutionally in this case could have done no more than to return it for a new trial. *Slocum* v. *New York Life Insurance Co., supra; Baltimore & C Line* v. *Redman, supra; Aetna Insurance Company* v. *Kennedy, supra.*

The uncertainty left by the decisions as to the extent to which appellate courts, without trespassing upon the guarantees of the Seventh Amendment, in weighing evidence, passing upon credibility of witnesses, resolving conflicts in the evidence, selecting the inferences which may be drawn therefrom, all from a printed record, as well as the extent to which Rule 50(b) may be in contravention of the restraints and guarantees of that Amendment insofar as the rule may purport to authorize a reviewing court to direct the entry of a definitive, summary judgment, contrary to a jury verdict upheld by the trial court, are serious questions of national importance which should be authoritatively reviewed and settled. It may be many a day before an opportunity will be presented to this Court at least to set some limits upon a reviewing court's domination and preemption of the jury's historic function, because few will be emboldened to seek redress here in the ordinary common law civil jury case, if the decision of the Circuit Court of Appeals is upheld.

The common law civil jury system is on trial here. There is no better body of persons in the world to determine facts than an American jury. It is doubtful whether there is any better tribunal for determining facts in a common carrier or bus negligence action than an American metropolitan jury, who live in the world of affairs and travel in busses or motor vehicles probably every day of their lives. If decisions on the disputed factual matters presented in this case cannot be entrusted to them but may be resolved contrary to their view, as well as to that of the trial court who was never in doubt about the sufficiency of the evidence, by an appellate court upon a printed record, then the jury function in the Constitutional sense is a fiction.

Petitioner was severely and permanently injured. The jury awarded her the sum of $20,000. That has been

taken away from her and she has not even been afforded the right of a new trial.

It is respectfully submitted the questions raised on this petition should be considered on their merits with the benefit of full brief and oral argument, particularly in view of the national importance of the proper administration of justice in civil jury trial cases.

CONCLUSION

A rehearing of the order denying the petition for a writ of certiorari should be granted and on such rehearing a writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

DORSEY K. OFFUTT
Counsel for Petitioner

The undersigned counsel for petitioner herein hereby certifies that the foregoing petition is presented in good faith and not for delay, and such petition is restricted to the grounds above specified.

DATED: Washington, D. C. November 10, 1951.

DORSEY K. OFFUTT